THE PROSECUTOR'S MANUAL
Chapter 22
GRAND JURY

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I. INTRODUCTION

A. Purpose of Manual

This manual is meant to assist new prosecutors and to serve as reference material for the more experienced prosecutor. As a manual for the new prosecutor, it makes suggestions about how to accomplish a task the beginner has never faced before. Different counties have evolved different approaches to the same problem. The National Institute of Justice Research Report, "The Role of the Grand Jury and the Preliminary Hearing in Pretrial Screening" published May, 1984, (NIJ Report hereafter) studied the grand jury and preliminary hearings in Maricopa and Pima Counties, as well as the state grand jury. The NIJ Report noted differences between the uses and practices of the different grand juries. For instance, one perceived difference was in the choice of what type of case to take to the grand jury. Pima County took routine cases to the grand jury while Maricopa County took routine cases to preliminary hearings. The NIJ Report concluded that what shapes the grand jury practices is the perception of the local bar and judiciary about the needs and functions that the grand jury fills.

The suggestions in this manual are not intended to take the place of locally tested and approved procedure. A beginner should read the manual before presenting a case to the grand jury, and should consult with more experienced people in the office about what the locally approved practice is.

B. Grand Jury History

Since common law days, the grand jury has had a two-fold function. The grand jury serves to bring the guilty to trial and free the innocent. *See generally United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (contains good language for grand jury orientation); *Franzi v. Superior Court of Arizona In and For Pima County,* 139 Ariz. 556, 559, 679 P.2d 1043, 1046 (1984).

C. Grand Jury Purpose

The primary function of the grand jury is to investigate whether there is probable cause to believe a crime was committed and whether the person under investigation committed it. *State v. Coconino County Superior Court (Mauro)*, 139 Ariz. 422, 424, 678 P.2d 1386, 1388 (1984) citing *State v. Baumann*, 125 Ariz. 404, 610 P.2d 38 (1980). Because the function of the grand jury is to determine whether there is probable cause and not to determine the defendant's guilt or innocence, the prosecutor does not have to present all the evidence, and the defendant has no right to testify before the grand jury. *State v. Jessen*, 130 Ariz. 1, 5, 633 P.2d 410, 414 (1981).

D. Grand Jury Jurisdiction

The grand jury's duty to investigate crime is wide ranging and, as a consequence, it can investigate crimes for which it may lack authority to indict. The grand jury has a right to secure evidence from anyone, unless the potential witness has an applicable privilege. *Franzi v. Superior Court*, 139 Ariz. 556, 560, 679 P.2d 1043, 1047 (1984); *Marston's Inc. v. Strand*, 114 Ariz. 260, 560 P.2d 778 (1977). The grand jury

must have some reason to believe that a crime has been committed; it cannot just decide that a person deserves to be investigated. *Wales v. Tax Commission*, 100 Ariz. 181, 183, 412 P.2d 472, 474 (1966). Some element of the crime must have occurred within the jurisdiction of the grand jury. *State v. Cox*, 25 Ariz.App. 328, 543 P.2d 449 (App. Div. 2 1975).

E. Other Charging Methods

The other main method of finding probable cause is a preliminary hearing, followed by the prosecutor filing an information. Ariz. R. Crim. P. Rule 5.

1. Indictment Not Constitutionally Mandated

Unlike federal law, no Arizona rule mandates that major offenses, even capital crimes, be charged by an indictment; an information is sufficient. *State v. Michael*, 103 Ariz. 46, 47-48, 436 P.2d 595, 596-97 (1971). In fact, the state has a constitutional right to choose which of these methods it will use to proceed. See Ariz. Const. art. 2, § 30 and *State v. Gonzales*, 111 Ariz. 38, 42, 523 P.2d 66, 70 (1974).

2. Constitutionality of Prosecutor's Election

Leaving the choice of method to the prosecutor does not deny the defendant equal protection of the laws (U.S. Const., amend. XIV), even though the defendant receives certain procedural safeguards at a preliminary hearing (notice of charges, right to counsel, subpoena of witnesses, right to confrontation, testifying on own behalf) that he does not receive at a grand jury proceeding. *State v. Bojorquez*, 111 Ariz. 549, 553, 535 P.2d 6, 11 (1975), reaffirmed in *State v. Sisneros*, 137 Ariz. 323, 325-26, 670 P.2d 721, 723-24 (1983). Likewise, a defendant's claim he did not receive equal discovery was defeated because he received a transcript of the grand jury proceeding. *Bojorquez*, 111 Ariz. at 553-54, 535 P.2d at 10-11.

3. Preliminary Hearing After Indictment

The defendant has no right to a post-indictment preliminary hearing. *State v. Haas*, 138 Ariz. 413, 426, 675 P.2d 673, 686 (1983).

4. Indictment After Complaint

The state may proceed initially by complaint, then decide to dismiss the complaint prior to preliminary hearing and proceed by grand jury to seek an indictment. *Gonzales*, 111 Ariz. at 42, 523 P.2d at 70. It is also permissible for an indictment to supersede a complaint, even though a preliminary hearing on the same charges has already commenced. *State v. Hutton*, 143 Ariz. 386, 389, 694 P.2d 216, 219 (1985).

5. Procedure After Complaint Dismissed

The state may not file a complaint in one precinct of the county after another precinct had already dismissed the same complaint; however, the state can proceed by complaint again in the same initial precinct if it appears that a different decision would be justified, or the state can present the same charges to a grand jury. *Wilson v. Garrett*, 104 Ariz. 57, 59, 448 P.2d 857, 859 (1969). Also, if the state initially went before a grand jury and they returned a "no bill," the state can still proceed by a complaint and seek an information. *State v. Jahns*, 133 Ariz. 562, 568, 653 P.2d 19, 25 (App. Div. 2 1982). Finally, the state can appeal or bring a special action. *State v. Superior Court (Hutton)*, 137 Ariz. 534, 672 P.2d 199 (App. Div. 2 1983), aff'd in pertinent part *State v. Hutton*, 143 Ariz. 386, 694 P.2d 216 (1985).

6. Indictment After No Bill

If the grand jury refuses to indict and votes to terminate the investigation without returning an indictment, the grand jury must notify the court of the refusal to indict. Rule 12.7(b). If the prosecutor later develops other evidence, he should check with his supervisors about what to do. The options are to take the case to a preliminary hearing or to a new grand jury. If the prosecutor feels the grand jury erred, he may submit the same evidence to another grand jury. *State v. Tovar*, 128 Ariz 551, 555, 627 P.2d 702, 706 (App. Div. 1 1981); *See generally, State v.* Young, 149 Ariz. 580, 720 P.2d 965 (App. Div. 1 1986) (prosecutor committed harmless error in taking case from one grand jury to another).

7. Which to Use

The NIJ Report noted marked differences between the policies of Maricopa and Pima Counties about when to use the grand jury. Accordingly, beginners should consult their superiors to see what the policy of the office is. If there is no policy, there are several factors to consider. First, the preliminary hearing transcript of an absent witness is admissible at trial if the defense was allowed the right of cross-examination and the state has made a sufficient showing of the unavailability of the witness. *State v. Watson*, 114 Ariz. 1, 6, 559 P.2d 121, 126 (1976). Therefore, if the witness is a transient, the prosecutor might want a preliminary hearing. Likewise, sufficient testimony at a preliminary hearing may take the pressure off a witness whom the defendant might try to eliminate before trial. Domestic violence cases or child abuse cases where the victim may recant may be good cases to take to a preliminary hearing. Moreover, the preliminary hearing may be a good time to find out how strong a witness is.

On the other hand, the grand jury is probably the best tool for complex investigations or ongoing investigations like in *Marston's Inc. v. Strand*, 114 Ariz. 260, 560 P.2d 778 (1977). The grand jury may be a faster tool for handling a large volume of cases. The grand jury may be a better way to handle sexual assault cases, in order to spare the victim the further embarrassment of having to having to testify and be cross-examined in open court.

II. PROSECUTOR'S DUTY

A. General

The prosecutor attends the grand jury to examine witnesses, to give the jury legal advice, and to prepare indictments. A.R.S. § 21-408(A). The prosecutor is a servant of the grand jury, which determines how its power will be used. *State v. Doolittle*, 155 Ariz. 352, 356, 746 P.2d 924, 928 (App. Div. 1 1987); *Escobar v. Superior Court*, 155 Ariz. 298, 746 P.2d 39 (App. Div. 1 1987) (remanded because prosecutor refused to call child victim due to mistaken belief child was incompetent witness under statute). The prosecutor is given wide latitude in order to assist the grand jury in carrying out its functions. *Gershon v. Broomfield*, 131 Ariz. 507, 509, 642 P.2d 852, 854 (1982). "A restriction on the presentation of evidence by the prosecutor is in fact a restriction on the grand jury and its right to receive evidence on criminal matters." *Marston's Inc. v. Strand*, 114 Ariz. 260, 265, 560 P.2d 778, 783 (1977).

B. Witness Examination

The defendant is entitled to a fair and impartial presentation of the evidence by the prosecutor. *Crimmins v. Superior Court*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983).

1. Opinions and Presentation of Evidence

The prosecutor may not comment on the evidence or give his personal opinion. *See State v. Bojorquez,* 111 Ariz. 549, 554, 535 P.2d 6, 11 (1975). Sometimes the prosecutor must walk a fine line between giving legal advice and giving the prosecutor's opinion. If a prosecutor is not sure where the line is, he should remind the grand jurors that they determine probable cause.

One of the few cases to find that the defendant was denied a substantial procedural right by the prosecutor's failure to present the evidence in a fair and impartial manner is *Crimmins, supra*. *Crimmins* involved a kidnapping case in which the defendant claimed he was making a citizen's arrest. The prosecutor failed to mention to the grand jury that there were some inaccuracies in the testimony given and failed to read the statutes concerning citizen's arrest. "[T]he omission of significant facts, coupled with the omission of instruction on statutes which give the omitted facts their legal significance, rendered the presentation of the case against Crimmins less than fair and impartial." *Id*. at 43, 668 P.2d at 886. Note that omission of both facts and law was fatal to the indictment in this case. Other cases are *Escobar v. Superior Court*, 155 Ariz. 298, 746 P.2d 39 (App. Div. 1 1987)(remanded for failure to correct erroneous testimony about key element of serious physical injury) and *Nelson v. Roylston*, 137 Ariz. 272, 669 P.2d 1349 (App. Div. 2 1983) (prosecutor knowingly allowed misleading testimony about defendant's mental state and did not correct the testimony even when a grand juror asked).

2. Types of Questions

The customary rules of evidence do not apply to the grand jury. *State ex rel Berger v. Myers*, 108 Ariz. 248, 250, 495 P.2d 844, 846 (1972). For instance, hearsay is generally admissible before the grand jury. *Franzi v. Superior Court*, 139 Ariz. 556, 565, 679 P.2d 1043, 1062 (1984). *But see generally Escobar v. Superior Court*, 155 Ariz. 298, 746 P.2d 39 (App. Div. 1 1987)(if there is a high probability grand jury would not have indicted if it heard the expert testify, instead of getting a hearsay report, the case must be remanded). A prosecutor may ask leading questions of the witnesses when the proceedings are lengthy and deal with complex factual situations. *Baines v. Superior Court*, 142 Ariz. 145, 152, 688 P.2d 1037, 1044 (App. Div. 2 1984).

3. Custody of Evidence: Experts

The prosecutor may take custody of evidence brought to the grand jury and hire experts to interpret that evidence. The best practice is to have the grand jury foreperson swear the experts before they examine the evidence. *Marston's*, 114 Ariz. at 265, 560 P.2d at 783.

C. Giving Legal Advice

When advising the grand jury, the prosecutor should be careful not to intrude on the factual determinations to be made by the grand jury. If a question mixes fact and law, the prosecutor should answer the legal question, remind the grand jury they determine the facts, and offer to recall the appropriate witness. For example: "The use of a simulated knife is armed robbery while merely taking property by force is robbery. You are the ones who determine whether there is probable cause to believe whether defendant committed a crime. Do you want me to recall John Doe, the victim, or any other witness?" Another approach would be to merely read the two statutes and ask if the grand jury wants a witness recalled.

When giving legal advice to the grand jury, the prosecutor will normally give correct legal advice. However, heat-of-the-fray situations or situations not covered by precedent may result in the prosecutor giving incorrect legal advice. In these situations, the error must be fairly egregious before the courts will find unfairness in the proceedings. During the course of a homicide investigation, a failure to instruct the grand jury on different types of homicides or potential defenses was not error because these rules were read to the grand jury a few days prior to this defendant's case. *State v. Jessen*, 130 Ariz. 1, 5, 633 P.2d 410, 414 (1981).

1. Exculpatory Evidence

"An 'exculpatory statement' is a statement which tends to justify, excuse or clear the defendant from alleged fault or guilt." *State v. Cobb*, 2 Ariz.App. 71, 73, 406 P.2d 421, 423 (App. 1965).

a. Need Not Present All Exculpatory Evidence

The prosecutor need not present all exculpatory evidence, only clearly exculpatory evidence. "Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury from finding the existence of probable cause." A letter from defense counsel that is vague, does not reference clearly exculpatory evidence and is non-committal about the defendant's wish to testify is insufficient to require the prosecutor to submit to the jury. *Trebus v. Davis*, 189 Ariz. 621, 625-626, 944 P.2d 1235, 1239-40 (1997).

"Requiring the grand jury to consider all exculpatory evidence 'would put grand juries in the business of holding mini-trials.'" *Franzi v. Superior Court*, 139 Ariz. 556, 566, 679 P.2d 1043, 1053 (1984), citing *State v. Baumann*, 125 Ariz. 404, 408-09, 610 P.2d 38, 42-43 (1980).

b. When to Introduce Exculpatory Evidence

Perhaps the best statement of the standard required when a prosecutor must decide whether or not to present exculpatory evidence is that set out in *Mauro* where the court said that "the state is not obligated to present exculpatory evidence before a grand jury, absent a request from the grand jury, unless the evidence is clearly exculpatory." *State v. Superior Court (Mauro)*, 139 Ariz. at 425, 678 P.2d at 1389. *See also Baumann*, 125 Ariz. at 408-09, 610 P.2d at 42-43. "Clearly, exculpatory evidence is evidence of such weight that it would deter the grand jury from finding the existence of probable cause." *Mauro*, 139 Ariz. at 425, 678 P.2d at 1389. *See also United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979).

c. Reverse Only Affected Counts

Where the state did not present allegedly exculpatory evidence that applied to only three counts of a multi-count indictment, it would have been error to dismiss any of the other counts. *State v. Fendler*, 127 Ariz. 464, 480, 622 P.2d 23, 39 (App. Div. 1 1979).

d. Grand Jury Requests for Exculpatory Evidence

The prosecutor must inform the grand jury that the defendant wants to appear or has submitted exculpatory evidence. *Trebus v. Davis*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997); A.R.S. § 21-412.

2. Insufficient Legal Advice

One of the few cases which found insufficient legal advice was *Crimmins*, *infra*. The prosecutor failed to advise the grand jury about the citizen's arrest statute where defendant claimed to be arresting a burglar who had burglarized the defendant's home. The case was reversed only because evidence was also omitted or was stated misleadingly. *Crimmins v. Superior Court*, 137 Ariz. 39, 42-43, 668 P.2d 882, 885-886 (1983). But see section B(3), *infra*.

3. Lesser Included Offense

The *Mauro* opinion clarified *Crimmins*, stating that *Crimmins* did not set out a mechanical test, and that "the state is not required by *Crimmins* or any other authority, to instruct on all lesser-included offenses. If an indictment is supported by probable cause, and the state makes a fair and impartial presentation of the evidence and law ... the state need only instruct on the highest charge supported by the evidence." *Mauro,* 139 Ariz. at 425, 678 P.2d at 1389 (internal citations omitted).

4. Perjury and False Testimony

The prosecutor may not knowingly use perjured testimony. *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1978). In *Basurto*, the prosecutor learned of the perjury after indictment but prior to trial. *Id*. at 784. The prosecutor should have gone to the court and grand jury and told them of the perjury. *Id*. Defendant's conviction was reversed because the prosecutor merely told defense counsel and the trial jury about the witness's perjury. *Id*. at 785.

Arizona has also held that the prosecutor may not knowingly use false testimony. *Nelson v. Roylston*, 137 Ariz. 272, 276, 669 P.2d 1349, 1353 (App. Div. 2 1983). In fact, it is incumbent upon the prosecutor to correct the record in grand jury proceedings when a witness provides false or misleading testimony because the defendant has no means of cross-examination or an opportunity to rebut the testimony at that stage. *Id*. at 277, 669 P.2d at 1354.

While the prosecutor should never knowingly use perjured testimony or false testimony, if he later discovers that perjury was committed, a remand is not always necessary if the false testimony was not material. *State v. Brewer*, 26 Ariz.App. 408, 549 P.2d 188 (App. Div. 1 1976). For example, allegations that someone lied about whether the defendant broke a beer glass before hitting the victim with the glass were insufficient to justify a remand. *State v. Jacobson*, 22 Ariz.App. 128, 130, 524 P.2d 962, 964 (App. Div. 2 1974). *See also State v. Austin*, 124 Ariz. 231, 603 P.2d 502 (1979). (inconsistencies in the witness statements did not require dismissal and remand because they were not made to grand jury and unknown to prosecutor before testimony).

5. Answering Questions Properly

Generally, prosecutor should not interfere with grand juror's questioning of witness unless it is along clearly improper and unfair lines of inquiry. *State v. Superior Court In and For County of Coconino*, 186 Ariz. 143, 146, 920 P.2d 23, 25 (App. Div.1 1996).

A prosecutor's legal advice that the way to get the defendant's mother to testify was to subpoena her and then grant her immunity (thus negating her right to take the Fifth) was not considered a violation of

defendant's "substantial procedural rights." *State v. Superior Court In and For Pima County*, 119 Ariz. 286, 288, 580 P.2d 747, 749 (App. Div. 2 1978).

6. Incorrect Legal Advice Given: Test

Clearly erroneous instructions to a grand jury that nine votes were necessary to render a "no bill" were harmless error because the vote to indict was unanimous. *State v. Hocker*, 113 Ariz. 450, 454, 556 P.2d 784, 788 (1976), *disapproved on other grounds, State v. Jarzab*, 123 Ariz. 308, 311, 599 P.2d 761, 764 (1979). Though these instructions were given by the presiding judge, the case demonstrates that an error in the giving of legal advice must be substantial. The test in *State v. Young*, 149 Ariz. 580, 585,720 P.2d 965, 970 (App. Div. 1 1986) was that a dismissal was proper only if the evidence was "irrevocably tainted" or a prevalent or continuous pattern of misconduct existed. Even a misstatement of homicide law has been held to be harmless error on appeal after a jury found the defendant guilty beyond a reasonable doubt. *State v. Horner*, 112 Ariz. 432, 433, 543 P.2d 118, 119 (1975). However mistakenly telling the grand jury a three year old molest victim was incompetent as a witness and could not be called required a remand in *Escobar v. Superior Court*, 155 Ariz. 298, 746 P.2d 39 (App. Div. 1 1987).

7. Protect Witnesses and Investigation

If "extraordinary circumstances" exist, A.R.S. § 21-411(A) allows the prosecutor to petition the court to prevent disclosure of the grand jury transcript, or portions thereof. If a situation arises where disclosure of a portion of the transcript will hinder another investigation or endanger lives, the prosecutor should make an A.R.S. § 21-411(A) motion. *See generally Franzi v. Superior Court*, 139 Ariz. 556, 567, 679 P.2d 1043, 1054 (1984).

8. Determine Impartiality of Grand Jury

If something in the proceedings alerts the prosecutor to possible bias on the part of a grand juror, the prosecutor should determine whether the grand juror is biased. *See generally State v. Caldwell*, 117 Ariz. 464, 573 P.2d 864 (1977). Bias is something more than strong feelings about a type of crime; the question is whether the grand juror can decide the case solely on the basis of the evidence and the law. *State v. Salazar*, 27 Ariz.App. 620, 624, 557 P.2d 552, 556 (App. Div. 2 1976).

A defense attorney may not interview various or all members of a sitting grand jury, even when he makes a *prima facie* showing of bias or prejudice. *State ex rel. Hastings v. Sult*, 162 Ariz. 112, 115, 781 P.2d 590, 593 (1989). The proper remedy for such a showing is remand for a new probable cause finding. *Id.*

9. Take Attendance

Although taking attendance is the foreman's duty, the prosecutor should be aware of the number of grand jurors present. In long investigations, the only grand jurors who may vote on the matter are the grand jurors who heard all the evidence. A.R.S. § 21-406(B); *Abbott v. Superior Court*, 86 Ariz. 309, 313, 345 P.2d 776, 778 (1959). Prosecutors should watch attendance in cases where they may have to take a recess to clear up Fifth Amendment/contempt problems. The prosecutor should exclude jurors who missed hearing portions of the evidence, in order to avoid motions to remand because an "unqualified" person was present.

10. Exclude Unauthorized People

While the prosecutor should defer to the grand jury foreperson when taking action on unauthorized persons attending the grand jury, the prosecutor should be aware of the problem. Rule 12.5 excludes everyone not authorized by law. The only people authorized by law are the grand jurors, the grand jury judge, prosecutors authorized to present evidence (more than one prosecutor may be present), the reporter and an interpreter, if necessary. A person under investigation may bring his own attorney, A.R.S. § 21-412, but that attorney can communicate only with his client and should be excluded if he does anything other than that.

The question or whether a person is a person under investigation becomes more important in this context. If the person is a "target" or "person under investigation" (see the section on Targets, *infra*.) the person is entitled to his attorney, but if they are not a "target," the attorney is an unauthorized person. While there is language in *State v. Rivera*, 128 Ariz. 127, 128, 624 P.2d 324, 325 (App. Div. 2 1980), indicating that a defendant is not denied a substantial procedural right by the presence of an unauthorized person in the grand jury room, give the matter some thought to save having to answer later motions.

11. Tactical Grand Jury Guidelines

The following is a handy little guide from Maricopa County sent to APAAC by Miles Nelson.

DON'T communicate with Grand Jurors outside of the Grand Jury room at any time.

DON'T engage in off the record discussions inside the Grand Jury room.

DON'T refer to the subject of the investigation as the defendant or the suspect.

DON'T allow the witness to comment on the subject's prior criminal activities, arrests or convictions.

DON'T comment on the source of the subject's photograph or fingerprint when referring to photo lineups and print comparisons.

DON'T refer to prior judicial proceedings involving the subject of the investigation (i.e. P/H remand, juvenile transfer).

DON'T answer questions of fact (recall witness to respond to question of fact).

DON'T allow a witness to answer legal questions.

DON'T read the penalty portions of statutes to the Grand Jury except those statutes where a factual determination is required for classification (theft-value).

DON'T mention arrest to the Grand Jury during presentation of case if suspect was arrested during police investigation.

DON'T comment on the subject of the investigation's right to remain silent. (A witness should not testify that the subject refused to answer questions regarding the investigation).

DON'T respond to legal questions with ad libs. Read the applicable statutes or legal opinion.

DON'T hesitate to call a brief recess when additional time, consultation or research is necessary to accurately respond to a legal question.

DON'T allow the witness (police officer) to render personal opinions regarding the investigation unless the witness qualifies as an expert. (Narcotics officer could testify that based on his training and experience the drug was possessed for sale.)

DON'T allow the witness to testify regarding facts recited in the affidavit supporting of the issuance of a search warrant.

DO prepare the witness for potential pitfalls and problems.

DO exhort the witness to testify fairly and accurately.

DO present evidence that is clearly exculpatory in nature.

DO admonish the Grand Jury to disregard statements or testimony improperly made or presented which are highly prejudicial to the subject of the investigation. (i.e., prior criminal record-refused to give statement to investigating officer-witnesses personal opinions, etc.)

D. Prosecutors in Grand Jury Room

1. More Than One Prosecutor

It is permissible for more than one prosecutor to be present in the grand jury room, even if the second is not presenting evidence. *State v. Gretzler*, 126 Ariz. 60, 68, 612 P.2d 1023, 1031 (1980).

2. Prosecutor as Witness

a. As Possible Witness

The fact that a prosecutor could be a witness in the case did not prevent the prosecutor from presenting the case to the grand jury. *State v. Steele*, 23 Ariz.App. 73, 77, 530 P.2d 919, 923 (App. Div. 2 1975).

b. As a Witness

If a prosecutor does become a witness, that prosecutor must disqualify himself, but other prosecutors from the same office may continue to prosecute the case. *See generally State v. Lopez*, 145 Ariz. 193, 700 P.2d 891 (App. Div. 2 1985).

c. Disqualified Prosecutor

If a prosecutor has been disqualified, the prosecutor should not be present in the grand jury room.

E Decide Charges

Prior to charges being brought before the grand jury, the prosecutor must decide what charges, if any, should be filed. Here are some possible considerations which were prepared by the Cochise County Attorney's Office.

1. Determine the elements of the crime(s) from the statute(s).

2. Review the charging manual forms and notes, if any.

3. Read the reports with the elements in mind. Ask the officer to see if there is more evidence on the weak areas of the case.

4. DO NOT ISSUE CHARGES UNLESS YOU HAVE EVIDENCE AVAILABLE WHICH SUPPORTS EACH ELEMENT OF THE CRIME(S), AND CREATES A REASONABLE LIKELIHOOD OF A CONVICTION AS TO THAT CHARGE.

5. Keep jury appeal in mind.

6. Don't "bet on the come." In drug cases, wait for lab reports on hard drugs. Don't expect an arrest and confession to cure the holes in your case.

7. Approach the reports somewhat skeptically. If the report doesn't convince you that the case is good, you will have problems convincing a trial jury.

8. Don't restrict your case or your proof with the charging document. For example, allege the statutory range of values, not specific prices.

9. Consider alternate charges, including ones that are easier to prove.

10. Charge lesser crimes that are not necessarily lesser included crimes. If you charge armed robbery and two people were involved, charge aggravated robbery as a lesser, especially if the weapon was not recovered. If an aggravated assault is not strong, consider charging endangerment as a lesser.

11. The courtroom clerk reads the indictment to the jury early in the trial. This is your first argument to the jury. Charge simply but forcefully.

12. If you charge a crime where you can't expect to prove an element, you are overcharging. If you charge less than the case is worth, there is much less room to do justice.

13. Charge what is reasonably supported by the evidence as you understand it to be at the time you charge the case. Ask for more information or further investigation on weak areas.

14. If the defendant was on probation, parole, or subject to enhanced punishment, allege the appropriate enhanced punishment section in the numbers below each count.

F. Prepare Indictments

Part of the prosecutor's duty is to draft indictments. The duty of the grand jury is to hear charges brought by the prosecutor. A.R.S. § 21-407, 21-408. *See State v. Faught*, 97 Ariz. 165, 398 P.2d 550 (1965); *United States v. Batchelder*, 442 U.S. 114, 124, 99 S.Ct. 2198, 2204 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65, 98 S.Ct. 663, 668-69 (1978). *See also State ex rel Berger v. Myers*, 108 Ariz. 248, 495 P.2d 844 (1972). The prosecution may properly use a prepared indictment to bring these charges before the grand jury. *See generally Baines v. Superior Court in and for Pima County*, 142 Ariz.

145, 688 P.2d 1037 (App. Div. 2 1984) (pre-prepared indictment not grounds for reversal where grand jury was clearly informed the indictment did not infringe on their powers).

The prosecutor has the duty of selecting the charges to be brought before the grand jury. The grand jury's primary duty is to determine probable cause, once an alleged offense is brought to its attention. The grand jury is without the legal skills necessary to properly undertake the initial selection of the charges and to thereby insure that those who have been investigated by the grand jury are not subject to casual and ill-considered charges. The Supreme Court of Indiana in *Turpin v. State*, 189 N.E. 403, 404 (1934), analyzed the prosecutor's role. The Court stated:

> The drafting of indictment is highly technical, and in determining the crime with which a person is to be charged, consideration must be given to the facts which may be established by the evidence, and it must be determined what crime, if any, will be established by the facts available. An attempt by grand juries to determine for themselves, without advice or consultation with the prosecuting attorney, what, if any crime is established by the facts concerning which they have heard evidence, and the character of the indictment which will properly charge that crime would undoubtedly lead to numerous miscarriages of justice. The statute must not be interpreted as meaning that the prosecutor shall not aid and assist the grand jury in determining what, if any crime is constituted by given facts and the method of charging the crime.... It is contemplated that when they are fully advised, the jurors shall finally deliberate and determine whether they will. believe or disbelieve the evidence produced before them, or any of it, whether a crime has been committed, and if so what crime, and whether there is sufficient evidence to justify the return of the indictment suggested by the prosecuting attorney, or any other indictment and that during these deliberations, and at the time of their final votes, no person other than the jurors shall be present.

In addition, *State v. Doolittle*, 155 Ariz. 352, 746 P.2d 924 (App. Div. 1 1987), should be of some use. In *Doolittle*, the court suppressed evidence of a witness' perjury because the witness was not warned that she was a target. *Id*. at 354, 746 P.2d at 926. The prosecutor argued that the witness's employer, not the witness, was a target. *Id*. at 355, 746 P.2d at 927. The *Doolittle* court gave the argument short shrift, saying the grand jury determined who got charged with what, not the prosecutor. *Id*. at 356, 746 P.2d at 928.

A possible approach to the situation is to broach the problem during the empanelment of the grand jury. After the grand jury has been instructed on their duties and powers the matter of prepared indictments should be brought up. A possible dialogue follows (delete or add freely, this dialogue is merely to give you a feel for the problem).

> You have been told that the job of the county attorney and deputies is to assist you and give you legal advice. You have been told that part of your duties are to consider the charges brought by the prosecutor. You have been told that you are the people who determine whether to charge anyone with a crime, whom to charge and what the charges will be.
>
> You know that when the prosecutor reads you a list of witnesses, people involved in the crime and potential charges at the start of the case, the prosecutor is merely telling you

so you can know whether you should disqualify yourself from hearing the case. You can charge anyone with any charge you feel is supported by probable cause, and you do not have to charge anyone. The charging method used is an indictment.

An indictment can come to you in a couple of ways. The first way is a blank sheet of paper. After you have decided to charge someone, you tell the prosecutor, the prosecutor goes back to the office and has a secretary type up the indictment that you want. You will have to sit and wait while the typing is done, and the typing can take some time, especially in a big case involving lots of people and lots of charges. Then the prosecutor brings the indictment back and leaves it. You go back into session and vote on whether to accept the indictment. You would notify the prosecutor when you accepted the indictment and only then could you move on to the next case.

The other way is for the prosecutor to bring into the grand jury a draft indictment. The prosecutor could use the draft indictment to give you the same information you would get anyway when the prosecutor told you about potential defendants and charges, so you could know whether to disqualify yourselves. After the evidence is presented, everyone leaves the room so you can deliberate. If you find probable cause you could accept the draft indictment. You could also call the prosecutor back and have any changes you wanted made in the draft indictment. You can add people and charges or delete people and charges. If you did not find probable cause you would not return an indictment. Whatever decisions you made, a draft indictment would save time and might be useful in complicated cases.

We are going to leave the room now and let you vote on whether to request the prosecutor to bring draft indictments for the cases.

One last thing before we leave. The court reporter will always be the last one to leave the room. That is so there will be no off-the-record discussions in case one of you thinks of a question as the prosecutor is leaving the room.

1. Language to Use

Unless there are special circumstances, the prosecutor should use the language of the statute when drafting indictments. *See generally State v. Self*, 135 Ariz. 374, 380, 661 P.2d 224, 230 (App. Div. 1 1983).

2. Use Punishment Section Numbers

If your case involves any of the special enhancement provisions, be sure to cite those statute numbers. Alleging the statute number in the indictment is sufficient notice to the defendant that the state is seeking enhanced punishment. *See generally State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985) (including A.R.S.§ 13-604.01 in indictment put the defendant on notice that enhanced punishment was being sought). The state may also include an allegation of dangerousness in a grand jury indictment by citation to the appropriate statute. *State v. Burge*, 167 Ariz. 25, 28, 804 P.2d 754, 757 (1990).

3. Overt Acts In Conspiracy Cases

It is a good idea to allege overt acts in the indictment and to explain what overt acts are to the grand jury. *State v. Baumann*, 125 Ariz. 404, 409, 610 P.2d 38, 43 (1980).

4. Indictments with Defendants at Large

If you have a case involving some defendants in custody and some at large, consider drafting the indictment of the defendants in custody so that the language does not reveal the indictment of the fugitives.

III. IMMUNITY

A. In General

In Arizona, immunity is based on A.R.S. § 13-4064, which deals with grand juries. If the prosecutor applies in writing to the court, the court may grant the request. If the court grants the request, defendant is granted use immunity. Use immunity means essentially that anything defendant says under the grant of immunity cannot be used against him, nor can anything derived from what he said be used against him.

Once immunity is granted, the defendant must answer the questions. If the defendant does not answer the questions, the court can find him in contempt and jail him until he purges himself by answering.

B. Immunity Considerations

Before granting immunity, the prosecutor should consider possible consequences and alternatives. The grant of immunity may affect the credibility of the witness, before the grand jury and possibly at trial. Granting immunity to a witness who is not involved may unnecessarily "taint" the witness in the jury's eyes. Granting immunity to peripheral witnesses may leave the jury with the impression of people trying to cover up their own misdeeds by blaming others. Granting immunity to some witnesses may lead to charges of prosecutorial vindictiveness, both as a legal matter and as a "defense" to the charges before the jury. Immunity is not a panacea.

Some problems can be solved without the use of immunity. Non-involved witnesses can be compelled to testify over their invalid Fifth Amendment claim. If the person has counsel, contact counsel and have the attorney tell his client about the Fifth Amendment. Or, you can take a recess and allow the judge to explain to the witness about the Fifth Amendment. Depending on the county, the mechanism for having the judge explain may vary. Explanations may involve the appointment of a public defender or may involve a contempt hearing.

Peripherally involved figures present a different problem. In the context of an investigative grand jury, advance arrangements for a plea in return for testimony are possible. Such a tactic is probably impossible in the context of regular juries, secret grand juries and defenses paid for by the principals. Before granting immunity, the prosecutor should consult office policy or his or her supervisor.

C. Granting Immunity to Person to be Prosecuted

Situations may arise where the prosecutor may need to grant immunity to a person who will be prosecuted. The fact that immunity has been granted does not prevent prosecution. *State v. Rivera*, 128 Ariz. 127,

624 P.2d 324 (App. Div. 2 1980). The state cannot use the defendant's immunized testimony against him, and the state is open to an attack that the trial evidence was derived from the immunized testimony. If at all possible, the prosecutor should make a record of the evidence against the witness prior to a grant of immunity. The record should contain everything which would be given the defendant as Rule 15.1 disclosure. This may not always be possible, but is the best tactic to rebut the defendant's claims that the evidence flowed from the immunized testimony.

If further investigation of the immunized witness is necessary, if at all possible use an officer or investigator who is unaware of the grand jury testimony. If other officers are aware of the testimony, the new officer should be told not to discuss the case with the other officers.

None of these steps are constitutionally necessary before the evidence can be used against the defendant if the state can prove that the evidence was not derived from the immunized testimony. These suggested procedures make the job of proving the independence of the evidence a lot easier.

D. Defense Witnesses and Immunity

Both A.R.S. § 13-4064 and the cases under the statute make it clear that the prosecutor is the one who decides to grant immunity. Resist defense efforts to get immunity for defense witnesses.

IV. FIFTH AMENDMENT

A person under investigation by the grand jury is sometimes called a "target." Targets deserve special consideration in several different areas. Prosecutors must notify targets who testify of their rights, and failure to do so will result in exclusion of all evidence derived from the testimony. *State v. Doolittle*, 155 Ariz. 352, 357, 746 P.2d 924, 929 (App. Div. 1 1987) (perjury indictment dismissed). The prosecutor must consider the Fifth Amendment rights of the target. Peripheral targets may have to be granted immunity. The prosecutor will need to consider whether a peripheral figure may become a target, and whether the peripheral figure should be warned. If a peripheral figure is allowed to have his attorney present, and a court later decides the peripheral figure was not a person under investigation, the attorney would be an unauthorized person present.

A. "Targets" or "Persons Under Investigation

Other jurisdictions call people who are intended defendants in grand jury investigations "targets." Arizona calls them "persons under investigation" and case law from other jurisdictions is not always helpful because apparently no other jurisdictions have the equivalent of Rule 12.6 and A.R.S. § 21-412. These provisions give the "person under investigation" more rights than the United States Constitution because evidence obtained in violation of these provisions may be suppressed. Finally, the intent of the prosecutor about whether to indict someone is irrelevant, because the grand jury chooses who to indict. *State v. Doolittle*, 155 Ariz. 352, 357, 746 P.2d 924, 929 (App. Div. 1 1987).

The problem with *Doolittle* is it not only created a state exclusionary rule, it failed to establish a test for whether a person was under investigation. The opinion said since this was a new area of the law, the only thing possible was a case-by-case decision process. Thus, all we can do is look at the facts of *Doolittle* and try to draw conclusions.

In *Doolittle,* a doctor was suspected of Medicare fraud, so an undercover operative was sent in to investigate. *Id*. at 354, 746 P.2d at 926. After the doctor learned of the investigation, the undercover operative saw the doctor and a twelve year clerical worker, Doolittle, apparently altering files which had been subpoenaed. *Id*. When the clerical worker testified before the grand jury the prosecutor told her that tampering with files was serious and was frowned upon. *Id*. The prosecutor did not warn the clerical worker of her right to remain silent or her right to have counsel present. *Id*. The clerical worker testified that no evidence tampering had taken place. *Id*. The clerical worker did not know about the undercover investigator at that point. *Id*.

Subsequently, the undercover officer told the grand jury that when the clerical worker testified, the investigation had expanded to include an investigation of evidence tampering. The clerical worker was indicted for perjury. The appellate court upheld dismissal of the indictment, concluding that the witness was a "person under investigation." *Id*. at 356, 746 P.2d at 928.

Failure to warn the "person under investigation" meant suppression of the evidence was necessary even though the United States Constitution did not require suppression. *See United States v. Wong*, 431 U.S. 174, 97 S.Ct. 1823 (1977) (Fifth Amendment doesn't protect person from perjury charges even when person not warned of fifth amendment rights).

A good, cynical rule of thumb may be if the prosecutor can prove perjury and the witness chooses to lie, then the witness is a person under investigation, and the prosecutor should warn the witness. The prosecutor cannot assume the witness is innocent, or will tell the truth.

B. Revelation of Grand Jury Investigation to Targets

A defendant does not have a right to tell the grand jury his side of the story. *State v. Jesson*, 130 Ariz. 1, 5, 633 P.2d 410, 414 (1981); *United States v. Ciambrone*, 601 F.2d 616 (2nd Cir. 1979). If the defendant learns of the existence of the investigation and requests a right to present evidence, A.R.S. § 21-412 requires the prosecutor to present the request to the grand jury. The prosecutor should pass on the request to the grand jury without elaboration. *See generally State v. Just*, 138 Ariz. 534, 540-41, 675 P.2d 1353, 1359-60 (App. Div. 1 1983) (prosecutor's offer to summarize defense testimony violated § 21-412 and a court order but was not grounds for remand where sufficient evidence remained to indict). As a practical matter, even with notice of the hearings, there probably would be few offers of proof. The NIJ Report indicated that offers of proof of exculpatory evidence were made at only 8-14% of the preliminary hearings, and rarely affected the outcome of the proceedings. NIJ Report, 60 - 62. As a tactical idea, if the defense wants to present evidence, consider subpoenaing the defendant. This procedure insures fairness because the defense gets a chance to offer the evidence and the prosecutor gets a chance to test the defendant before the grand jury.

C. *Miranda* and the Grand Jury

A target of a grand jury investigation is not entitled to *Miranda* warnings. *United States v. Wong*, 431 U.S. 174, 179, 97 S.Ct. 1823, 1826 (1977).

D. Notification of Target's Rights

While a person under investigation does not have to be given *Miranda* warnings, the target should be informed of certain rights. The questioning might go like this, between prosecutor and targets.

Is your name John Doe?

Are you here in response to a grand jury subpoena?

[Do you know the grand jury is investigating _____?]

[Have you discussed this before with police, prosecutors, etc.?] Do you understand that the grand jury investigation may result in your being charged with a crime? (If the witness is a person under investigation.)

Do you understand that you have a right to remain silent, and that anything you say can be used against you in court? (If the person is under investigation)

Do you understand that if you want to, you can have a lawyer (inside or outside, depending on target status) to advise you?

Do you understand that if you lie when I ask you a material question, you will be prosecuted for perjury?

Do you understand that if you give false answers to non-material questions you may be prosecuted for false swearing? (The last two questions were based on *Franzi v. Superior Court*, 139 Ariz. 556, 562-64, 679 P.2d 1043, 1049-51 (1984) and set up perjury or false swearing charges if the witness lies.)

Do you have an attorney? Who is your attorney?

Do you want your attorney (outside) (to be here) to advise you?

Do you understand everything I told you? Do you want to talk to the grand jury?

E Witness Invokes Fifth Amendment

If the witness invokes the Fifth Amendment, the first thing to do is make sure the witness is actually invoking their rights. Use short, clear questions. Determine if the witness is refusing to answer, and what the reason is that the witness refuses to answer the question. See if the witness will answer related questions. The witness cannot simply plead the Fifth and refuse to talk; the privilege must be claimed on each question. *See Enrich v. United States*, 212 F.2d 702, 703-04 (10th Cir. 1954)(Fifth Amendment privilege does not extend to "remote possibilities out of the ordinary course of law"); *State v. Ethridge*, 126 Ariz. 8, 612 P.2d 59 (App. Div. 2 1980) (reiterates rule, but allows blanket refusal at judge's discretion).

The word "witness" is used because witnesses, as well as targets, may properly invoke their Fifth Amendment rights. If the witness is clearly invoking his or her right to remain silent, the next question is whether the witness is invoking the right properly.

The Fifth Amendment privilege is a personal right and cannot be raised by a third person. *State v. McElyea*, 130 Ariz. 185, 187-88, 635 P.2d 170, 172-73 (1981); *State v. Myers*, 117 Ariz. 79, 87-88, 570 P.2d 1252,1260-61 (1977). It does not apply to corporate records, even if the records would incriminate an individual. *See Marston's Inc., v. Strand*, 114 Ariz. 260, 264, 560 P.2d 778, 782 (1977); *United States v. MacKey*, 647 F.2d 898 (9th Cir. 1981).

The evidence sought to be precluded must be testimonial and privileged. *See Schmerber v. California*, 384 U.S. 757, 760-61, 86 S.Ct. 1826, 1830-31 (1966). The privilege applies to evidence which would form a link in the chain to incriminate the defendant. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951). The privilege does not apply to non-testimonial acts like trying on boots and dentures. *State v. Bridges*, 123 Ariz. 452, 454, 600 P.2d 756, 758 (App. Div. 1 1979). The privilege applies when production of evidence would authenticate the evidence and thus incriminate the person. *State ex rel Hyder v. Superior Court*, 128 Ariz. 253, 255, 625 P.2d 316, 318 (1981).

The Fifth Amendment right applies when the defendant has already been convicted and sentenced and is pursuing an appeal. *State v. Gortares*, 141 Ariz. 254, 260, 686 P.2d 1224, 1230 (1984). Consequently, the right would almost certainly apply to an already indicted co-conspirator.

If there is no possibility of self-incrimination, the privilege does not apply. Udall and Livermore, *Arizona Law of Evidence*, 2nd Edition, § 77. Easily understood reasons for not wanting to testify are insufficient. *See Roberts v. United States*, 445 U.S. 552, 558, 100 S.Ct. 1358, 1363 (1980) (prefer not to testify); *Brown v. Walker*, 161 U.S. 591, 16 S.Ct 644 (1896) (mere disgrace); *United States v. Damiano*, 579 F.2d 1001 (6th. Cir. 1978) (safety of self or others).

If the witness has obviously, validly invoked the Fifth Amendment, the prosecutor must evaluate the importance of the witness. If the testimony is not needed to obtain the indictment, then ask other questions which are necessary, and excuse the witness. When the questions are vital to the investigation, the prosecutor should call a recess in the particular matter in order to consult with the court.

In cases when the prosecutor doubts the validity of the exercise of the privilege, the prosecutor should explain the reason for the invalidity of the privilege. The witness should be offered a recess to consult counsel. If the witness refuses to answer, a recess should be taken to consult with the judge who presides over the grand jury.

The presiding judge can rule on whether the witness has a valid Fifth Amendment privilege. Exactly what procedure is followed will differ from county to county. The hearing should be on the record.

V. SUBPOENAS

A. Issuance of Subpoenas

A.R.S. § 13-4071(C) authorizes the issuance of subpoenas on behalf of a grand jury. Specifically, the clerk of the court is obligated upon the request of the prosecuting authority to issue a grand jury subpoena, provided certain procedural requirements are met. Simply stated, a prosecutor need not consult the grand jury or obtain prior authorization by the grand jury before requesting the clerk of the court to issue a grand jury subpoena if the following procedural requirements are complied with:

1. At the time of the issuance of the subpoena by the clerk, a duly empaneled grand jury is sworn and in existence;

2. The prosecuting authority must designate the subpoena with the standard identifying grand jury number;

3. The prosecuting authority must report to the foreman of the grand jury or in his absence the acting foreman, the fact of the issuance of the subpoena within 10 days following its issuance, or if the grand jury is in recess at the first succeeding session of the grand jury after the 10 day period;

4. The prosecuting authority must report to the Presiding Judge of the Superior Court the fact of the issuance of the subpoena within 10 days following its issuance.

It is imperative that these procedural requirements be strictly followed. Defense attacks upon the subpoena process have previously centered on deficiencies in record keeping and procedure. Strict adherence to the statutory procedure, and a commitment to a system of record keeping that clearly illustrates the seriousness upon which prosecutors place the grand jury subpoena power effectively thwarts defense attacks.

One of the procedures initiated by one county is to docket a portion of the opening of each grand jury to request issuance of subpoenas necessary for the next week's cases. If prosecutors know in advance who they will need, the procedure saves time and paperwork.

B. Service of Subpoenas

A.R.S. § 13-4072 sets forth the procedural requirements pertaining to the service of grand jury subpoenas after issuance by the clerk. Subpoenas may be served by any person, either personally, by certified mail, or by first class mail. If personal service is chosen, the subpoena server must show the original to the witness, inform him of its contents and deliver a copy of the subpoena to that witness. Certified mail service and first class mail service are authorized by A.R.S. § 13-4072(D) and (E). Written return of service must be made to the clerk of the court without delay.

C. Out of State Subpoenas

The service of subpoenas on witnesses residing outside the State of Arizona is governed by A.R.S. § 13-4091 et. seq. The statute sets forth the procedures to be followed in securing the attendance of an out-of-state witness. Again, as in all grand jury subpoena matters, the procedures proscribed by statute must be strictly adhered to. Failure to do so will make the subpoena unenforceable and may subject the prosecuting authority to accusations of misuse of the subpoena process.

VI. GRAND JURY EMPANELMENT

The mechanics of getting the grand jury empaneled is usually handled by other court personnel. The prosecutor attending the empanelment should be alert to problems, because a problem in empaneling the grand jury may result in the indictment being quashed. *See generally State v. Ahee*, 6 Ariz.App. 265, 431 P.2d 906 (App. 1967). Empanelment is also an opportunity to explain the reasons behind conduct which might otherwise puzzle or hinder the grand jury. The rest of this section deals with legal or practical points that are useful to know during orientation, or afterward.

A. Examination of Jurors

A.R.S. § 21-409(A) and Rule 12.1(d)(3) require the court and county attorney to examine the jurors regarding their qualifications prior to empanelment. However, neither the statute nor the rule requires the prosecutor to repeat the examination of the individual grand jurors prior to the

presentation of each case once they have already been examined at empanelment. *State ex rel. Hastings v. Superior Court of State of Ariz., In and For Yavapai County*, 156 Ariz. 250, 252-53, 751 P.2d 566, 568-69 (App. Div. 1 1987), citing *State v. Urrutia,* 24 Ariz.App. 439, 539 P.2d 913 (1975); *See also State v. Jessen*, 130 Ariz. 1, 5, 633 P.2d 410, 414 (1981) (prosecutor not required to reread elements of law read a few days before).

B. Bias or Prejudice

1. Strong Feelings

Impartiality does not mean that the prospective grand juror must have no opinion one way or the other about murder, robbery, or narcotics. "[T]he question is whether the juror can base his decision solely on the evidence presented to him and the law." *State v. Salazar*, 27 Ariz.App. 620, 624, 557 P.2d 552, 556 (App. Div. 2 1976). *See State v. Caldwell*, 117 Ariz. 464, 467, 573 P.2d 864, 867 (1977) ("not liking the case" not grounds for disqualification).

2. Prior Experience with Defendant or Co-Defendant

The same grand jury that indicted a defendant for various serious crimes can hear other charges against the defendant. *State v. Emery*, 131 Ariz. 493, 507, 642 P.2d 838, 852 (1981). *But see State v. Superior Court*, 121 Ariz. 341, 342, 590 P.2d 457, 458 (App. Div. 2 1977). The same grand jury which heard the perjury can indict a defendant for that perjury. *Franzi v. Superior Court*, 139 Ariz. 556, 565, 679 P.2d 1043, 1052 (1984).

3. If Juror Indicates Bias

The county attorney can question jurors to help determine whether they are legally biased. *State v. Caldwell*, 117 Ariz. 464, 468, 573 P.2d 864, 867 (1977).

C. Probable Cause

"Probable cause exists if an individual has a reasonable belief that a crime has been committed and that the defendant committed the crime." *State ex rel Collins v. Superior Court*, 132 Ariz. 479, 480, 647 P.2d 177, 178 (1982). There is one case which held that even if the court failed to instruct on probable cause, the case would not be remanded because probable cause was abundant. *State v. Brannin*, 109 Ariz. 525, 529, 514 P.2d 446, 450 (1983).

Don't count on *Brannin* if the judge doesn't give the instruction; do it yourself on the record. The purpose of the grand jury is to determine if probable cause exists, not to determine whether the charges are true. *State v. Jessen*, 130 Ariz. 1, 5, 633 P.2d 410, 414 (1981). If the grand jurors are confused about their mission, this case may help.

D. Everything on Record

The grand jury should be told that all proceedings, other than deliberations, are to be recorded. The only exception is for recesses where jurors may not discuss the case with anyone, including the prosecutor and the witness. *Wilkey v. Superior Court*, 115 Ariz. 526, 566 P.2d 327 (App. Div. 2 1977). This is an opportunity to explain that the court reporter will always be the last person out of the room, so that any last minute questions are recorded.

E. Prosecutor as Legal Adviser

The prosecutor should explain the prosecutor's job as legal adviser. This is a good time to start laying the groundwork to explain that the prosecutor can't answer the factual part of legal questions. The evidence comes from the witnesses. As part of the job of legal adviser the prosecutor may have to interrupt or make suggestions, if perhaps a witness is getting into legally impermissible areas.

F. Punishment

Empanelment may be a good time to explain to the jury that they are not to consider punishment. Punishment is left to the judge.

G. Defendant can Present Evidence

The prosecutor may want to explain that people who are under investigation have a constitutional right to refuse to testify. Their failure to exercise this right is not to be considered by the grand jury when they make their probable cause determination. On occasion, a person under investigation may want to talk to the grand jury. If the person under investigation submits a request, the grand jury must decide whether the grand jury wants to hear the testimony. A.R.S. § 21-412.

VII. CASE PRESENTATION

A. Impartiality, Fairness and Control

1. Impartiality and Fairness

This is just a brief reminder that the prosecutor should remain impartial, present the case fairly, and not give his opinion about the evidence. If jurors ask mixed questions of fact and law, the prosecutor should answer the legal part and offer to recall the witness. This topic is covered more extensively in the section on the prosecutor's duty, *supra*. Be aware that because grand juries use a lower standard of proof than do petit juries, the courts have held that the procedural requirements for grand juries should be no greater. *O'Meara v. Gottsfield*, 174 Ariz. 576, 578, 851 P.2d 1375, 1377 (1993).

2. Control

As part of the duty to be fair, the prosecutor should be prepared to handle the grand jury if the grand jury is in danger of acting unfairly. An example might be if the grand jury wanted to indict the defendant for armed robbery where the facts clearly supported only aggravated robbery. The prosecutor would have interrupt and point out that one of elements of armed robbery was a weapon, perhaps by reading the statutes. The prosecutor could remind the grand jury that they decide the facts and ask if the grand jury wanted to recall witnesses to see if there was evidence of a weapon. If the grand jury decided to indict for armed robbery after that, there is little the prosecutor can do.

The hard part is the judgment about when to intervene. Once in a while, intervention at the wrong time has resulted in a reversal. *Nelson v. Roylston*, 137 Ariz. 272, 669 P.2d 1349 (App. Div. 2 1983) (interrupted juror was asking about insanity in order to determine defendant's specific state of mind). Likewise, failure to act has constituted reversible error. *Crimmins v. Superior Court*, 137 Ariz. 39, 42, 668 P.2d 882, 885

(1983) (prosecutor failed to advise grand jury of citizen's arrest statutes where defendant claimed he was arresting burglar; prosecutor failed to correct misleading statements of police officer).

This section can't solve these problems in advance. If the prosecutor is in doubt about a question a grand juror wants answered, apply the *Mauro* exculpatory evidence test. Reading the cases referred to in the exculpatory evidence subsection would be good preparation. If the prosecutor still can't answer, apply the rules of evidence to the situation.

B. On the Record

Everything except the grand jury's deliberations should be on the record. *State v. Superior Court*, 26 Ariz.App. 482, 484,549 P.2d 577, 579 (App. Div. 2 1976); *Wilkey v. Superior Court*, 115 Ariz. 526, 566 P.2d 327 (App. Div. 2 1977) (no off-the-record discussions, even during recess). If a witness slips, a breach of the rule is not necessarily fatal. *State v. Caldwell*, 117 Ariz. 464, 466, 573 P.2d 864, 866 (1977) (unheard discussions between prosecutor and grand juror did not concern testimony); *State v. Neese*, 126 Ariz. 499, 616 P.2d 959 (App. Div. 1 1980) (witness and grand juror talked off the record); *State v. Clovis*, 127 Ariz. 75, 618 P.2d 245 (App. Div. 2 1980) (defendant not prejudiced). However, you may want to note the off-the-record remark when the proceedings are back on the record.

C. Hearsay Evidence

Hearsay evidence is admissible before the grand jury. *Franzi v. Superior Court*, 139 Ariz. 556, 565, 679 P.2d 1043, 1052 (1984); *State v. Baumann*, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980); *State v. Bowling*, 151 Ariz. 230, 232, 726 P.2d 1099, 1101 (App. Div. 2 1986). However, "[i]f there exists a high probability that they would not have indicted had they heard the testimony of the declarant rather than a hearsay version, then the matter must be remanded to allow the grand jury to make that determination." *Korzep v. Superior Court*, 155 Ariz. 303, 306, 746 P.2d 44,47 (App. Div. 1 1987).

The grand jury has been subjected to attacks because of the use of hearsay before the grand jury. These attacks generally ignore the fact that hearsay is also admissible at a preliminary hearing. Rule 5.4(c). If you have a controversial case and want to be absolutely warm, happy and safe about using hearsay, ask the Rule 5.4(c) questions. Ask if "there is reasonable grounds to believe that the declarants will be personally available for trial?"

D. Evidence

1. Customary Rules of Evidence

The customary rules of evidence do not apply to the grand jury. *State ex rel Berger v. Myers*, 108 Ariz. 248, 250, 495 P.2d 844, 846 (1972). Likewise, some of the most important rules do not apply at preliminary hearings. Rule 5.4. The customary rules of evidence can serve as a guide in tough situations.

2. Use of Evidence Before Grand Jury

The prosecutor does not have to introduce evidence shown the grand jury into the record. *State v. Superior Court (Brasher)*, 118 Ariz. 457, 577 P.2d 743 (App. Div. 2 1978). Rule 12.8 does not require the filing of anything except the transcripts and minutes. In the interests of fairness, the prosecutor should have the witness describe the evidence well enough to make it clear what the evidence was. Then the

prosecutor does not have to weather defense attacks that the prosecution is concealing evidence. Reproduce what can be reproduced, and mark it and make it part of the record, for the same reasons.

Why doesn't the prosecutor just make the exhibit itself a part of the record and turn it over to the clerk of the court? Because the prosecutor may forget where it is or that it even exists. Because the same prosecutor won't be trying the case. Because the clerk will lock it up in an evidence vault if it is an object. Because the witness will become confused when the defense interviews him and he can't find it. Because it might need lab testing or more lab testing, and the prosecutor doesn't need the hassle of getting a court order to have it released. Because the clerk can lose things - nearly as well as the prosecutor or the officer can.

The prosecutor obviously may use evidence before the grand jury. Pictures of the scene, the victim or whatever may clarify testimony in a way nothing else can. Charts and documents may be essential in more involved cases. Pictures, for instance, may bring home the impact of the crime more than the detached testimony of an officer that the position of the bullet wounds indicated they were not self-inflicted. Warn the grand jurors if you are going to use evidence which may upset them.

E. Lesser Included Offenses: Exculpatory Evidence

These topics are covered in the section entitled "Prosecutor's Duty". Most of the section deals with the presentation of evidence to the grand jury, so reading that section is highly recommended as well.

F. Reading Applicable Law

"Due process requires only that the prosecutor read all relevant statutes to the grand jury, provide them with a copy of those statutes to refer to during deliberations, and ask if they want any statutes reread or clarified." *O'Meara v. Gottsfield*, 174 Ariz. 576, 578, 851 P.2d 1375, 1377 (1993). The prosecutor does not need to give a separate instruction for a commonly understood term once the grand jury has already been instructed on all relevant statutes. *Id*.

"If an indictment is supported by probable cause, and the state makes a fair and impartial presentation of the evidence and law … the state need only instruct on the highest charge supported by the evidence." *State v. Superior Court (Mauro)*, 139 Ariz. 422, 425, 678 P.2d 1386, 1389 (1984). Failure to read the self-defense statutes which gave the omitted evidence its legal significance was reversible error. *Crimmins v. Superior Court*, 137 Ariz. 39, 42, 668 P.2d 882, 885 (1983). Omission of lesser degrees of homicide or defenses was not grounds for reversal, where the statutes had been read a few days before. *State v. Jessen*, 130 Ariz. 1, 5, 633 P.2d 410, 414 (1981).

VIII. MOTION FOR REMAND

Rule 12.9(a) permits the defendant to challenge the grand jury proceedings if the defendant was denied a substantial procedural right or if an insufficient number of grand jurors concurred in the finding of the indictment.

A. Timing of Motion and Requests for Extension of Time

A Rule 12.9 motion must be filed no later than 25 days after the certified transcript and minutes have been filed or 25 days after the arraignment, whichever is later. Rule 12.9(b). The trial court

may grant an extension of time to file a Rule 12.9 motion if good cause exists. *Maule v. Arizona Superior Court for Maricopa County*,142 Ariz. 512, 515, 690 P.2d 813, 816 (App. Div.1 1984). Alternatively, a defendant may file an initial motion within the time limits which may be supplemented after defense counsel has had time to review the full transcript, if an extension is granted. *Id*. In either case, the defendant must file the motion for an extension of time prior to the expiration of the 25 day period because the court has no authority to grant extension that is not made on timely basis. *Id.*

B. Substantial Procedural Right

A case may be remanded only if the court finds that the defendant was denied a substantial procedural right, or that an insufficient number of qualified grand jurors concurred in the finding of the indictment. Rule 12.9(a). The failure to comply with Rules 12.1-12.8 can be characterized as denying the defendant a substantial right. Rule 12.9(a), comment.

Improper testimony at grand jury proceedings does not require remand for a new determination of probable cause unless it is shown that testimony actually damaged and prejudiced defendant. *State v. Superior Court In and For County of Coconino*, 186 Ariz. 143, 146, 920 P.2d 23, 25 (App. Div.1 1996).

Erroneous testimony regarding an element of an offense should be corrected by the prosecutor or the case will be remanded to the grand jury for denial of a substantial procedural right. *Escobar v. Superior Court*, 155 Ariz. 298, 746 P.2d 39 (App. Div. 1 1987) (case remanded because officer's erroneous description of victim's injuries may have made the difference between "serious physical injury" or "physical injury"). However, misleading information on a collateral issue does not constitute the denial of a substantial procedural right and will not invalidate an otherwise valid grand jury determination of probable cause. *State v. Superior Court In and For County of Coconino*, 186 Ariz. at 146, 920 P.2d at 25.

Evidence elicited in violation of privilege constitutes a denial of a substantial procedural only where actual prejudice is shown. *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 502, 844 P.2d 1147, 1152 (1992) (remand denied where testimony given in violation of anti-marital fact privilege did not prejudice defendant).

Perjured testimony given to the grand jury may not constitute the denial of a substantial procedural right where other truthful testimony supported the indictment. *State v. Jacobson*, 22 Ariz.App. 128, 524 P.2d 962 (App. Div.2 1974).

C. Number of Qualified Jurors

Unless the defendant presents facts to support his claim that an insufficient number of grand jurors voted for return of a true bill, the actions of grand jury will be presumed lawful. *Franzi v. Superior Court of Arizona In and For Pima County*, 139 Ariz. 556, 679 P.2d 1043 (1984).

D. Appeal upon Denial of Relief

All challenges to a grand jury's findings of probable cause must be made by motion followed by special action before trial, and such challenges are not reviewable on appeal, with one exception,

which occurs when a defendant has had to stand trial on an indictment which the government knew was based partially on perjured, material testimony. *State v. Moody*, 208 Ariz. 424, 439-40, 94 P.3d 1119, 1134-35 (2004).

IX. SPECIAL INVESTIGATIONS

This Memorandum, by Alan Davidon, describes some procedure used by the Pima County Attorney's Office in connection with "special investigations" by the Grand Jury. There are only scarce references to authority since the substantive law of grand jury proceedings is dealt with elsewhere. There is no attempt at listing all of the procedures which can be utilized by prosecutors. Some procedures discussed, when carefully employed, will help prosecutors who have not previously used an investigative Grand Jury to minimize the risk of significant error.

The term "special investigation" is also limited to those cases where a decision has been made to allocate more prosecutorial resources than in the usual case. The need for a special investigation will most often arise where there is reason to believe:

(a) that a crime was committed, but it is unclear who committed it, or

(b) that an identified person committed certain acts but it is unclear whether there is a crime involved, or the scope of the crime is unclear.

An example of the first situation occurs when where police officers believe that a check passing ring has entered the jurisdiction. Aside from a number of stolen checks being passed by similarly described persons the police may only have the license plate number of the vehicle driven by the perpetrators. In this situation, it is clear that one or more crimes have been committed and the objective of the special investigation is to determine who committed the crime.

An example of the second situation is where it is determined that a person wrote an insufficient funds check to another. The mere writing of an insufficient funds check may be evidence of criminal conduct but without additional evidence concerning the status of the account (prior and subsequent balances, authorized signatures, etc.) no responsible grand jury should indict based solely on this quantum of evidence.

Reasons for Special Investigations

There are two principal reasons for conducting a grand jury investigation. In the absence of fraud, an investigation conducted by the grand jury will immunize the prosecutor from any and all civil liability. Particularly where large sums of money or reputations are involved, the fact that a person is under investigation, while damaging to the person under investigation, will not subject the prosecutor to liability if pursued through the grand jury as opposed to simply having the police officer make inquiries. The other principal reason for using a grand jury to conduct the investigation is the power to compel the production of evidence, either testimonial or documentary.

Prior to deciding whether to conduct a special investigation, the prosecutor and officer should consider whether there are other investigative procedures which would either be more productive than proceeding with a grand jury investigation or would be frustrated by the pursuit of a special investigation. For example, it is frequently easier to obtain information from a somewhat hostile witness during an informal meeting than under the constraints of a grand jury proceeding. Another example is where the

commencement of a grand jury proceeding would prematurely bring to the suspect's attention the fact that he is under investigation.

Prior to Appearance

Once it has been decided that the matter should proceed by way of special investigation before the Grand Jury, the first requirement is to select a Grand Jury which will probably be in existence for the entire period of the investigation. At the first session, it is critical that the prosecutor keep track of who is present. Generally accepted case law indicates that all and only those persons who have heard all of the testimony may vote in connection with any subsequent indictment. A.R.S. § 21-406(B); *Abbott v. Superior Court*, 86 Ariz. 309, 313, 345 P.2d 776, 778 (1959). If one is contemplating a special investigation which will take several appearances before the grand jury over a period of months, it is best to start with 15 or 16 grand jurors. After normal attrition only nine or ten persons will be available to deliberate and vote upon any indictment which may be appropriate after such a long period.

It is frequently useful to take a few minutes before the first appearance at a grand jury to reduce to one or two sentences why the state is proceeding before the grand jury. After formulating those one or two sentences, the prosecutor should try to formulate one or two sentences concerning how that day's proceeding will assist in obtaining those objectives.

Prior to conducting an important special investigation the prosecutor should read, at least, the headnotes of all the Arizona grand jury cases. The number of Arizona decisions interpreting grand jury issues is very limited and as a practical matter one is generally forced to look to the applicable federal decisions to resolve specific issues.

Prior to the first appearance at the grand jury the prosecutor and officer need to consider who, if anyone, is a person under investigation within the meaning of A.R.S. § 21-412. While this is frequently impossible in the context of a special investigation the applicable rules and statutes create a Hobson's choice for the prosecutor.

If one decides to treat a person as a "person under investigation" and it is subsequently determined that he was not a person under investigation the indictment may be subject to dismissal due to the presence of an unauthorized person in the grand jury. Specifically, in this situation, the person's lawyer would be an unauthorized person since the witness would not be a "person under investigation." This situation arose in a case where the state decided to give use immunity to a critical witness before his appearance at the grand jury and prior to a decision being made concerning whether or not he would be indicted based upon other evidence. He was subsequently not indicted and a motion to dismiss the indictment was granted upon this rationale. *But see State v. Rivera*, 128 Ariz. 127, 624 P.2d 324 (App. Div. 2 1980) (grant of use immunity did not prevent witness' prosecution).

If one decides to treat a person as not within the purview of A.R.S. § 21-412 and he is subsequently indicted, the basis for an argument to dismiss is clearly that the defendant was denied a substantial procedural right.

Upon the calling of the case by the Grand Jury it is frequently useful to mention the names of persons whose names will come up during the course of the testimony as well as commercial enterprises which

are significantly involved in the proceedings. The presentation of evidence to the grand jury, so reading that section is highly recommended as well.